STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 94B062

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DANIEL R. HOTCHKISS,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
ARKANSAS VALLEY CORRECTIONAL FACILITY,

Respondent.

Hearing was held on December 9, 1994 before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Joseph Haughain, First Assistant Attorney General. Complainant appeared and represented himself.

Complainant testified in his own behalf and called McKinley Caldwell, Lieutenant, Arkansas Valley Correctional Facility. Respondent's witnesses were William E. Price, Superintendent, and Robert D. Garcia, Food Services Manager, Arkansas Valley Correctional Facility.

Respondent's Exhibits 1 through 6 and Complainant's Exhibits A, B and C were admitted into evidence by stipulation of the parties.

MATTER APPEALED

Complainant appeals a Rule R9-1-4 administrative termination.

ISSUE

Whether Respondent's action in terminating Complainant's employment pursuant to R9-1-4 was arbitrary, capricious or contrary to rule or law.

PRELIMINARY MATTERS

At hearing, Complainant first stated that he chose to proceed without counsel, then at the onset of opening statements requested a continuance in order to retain an attorney because he did not realize that he would bear the burden of going forward and the burden of persuasion. Respondent, with three out-of-town witnesses present and available to testify, objected to a continuance. Complainant's motion was denied as untimely and fundamentally unfair to Respondent.

FINDINGS OF FACT

1. Complainant, Daniel R. Hotchkiss, became employed by the Department of Corrections (DOC) Food Services Department in 1988. He was certified in the position of Correctional Supervisor I at the Arkansas Valley Correctional Facility (AVCF) at the time of the administrative termination of his employment.

2. McKinley Caldwell was Complainant's immediate supervisor. Robert Garcia, Food Services Manager, supervises Caldwell. Apparently Garcia has also been Complainant's immediate supervisor in the past.

3. On October 3, 4 and 5, 1994, as the consequence of a lower back injury, Hotchkiss was off work on approved "injured on duty" (IOD) leave.

4. On October 5, 1994, Garcia called the medical center where he believed Hotchkiss to have a scheduled doctor's appointment and was informed that

Hotchkiss had canceled his appointment. Garcia then directed Caldwell to stop by Hotchkiss' residence.

5. On October 5, around 9:00 p.m., Caldwell drove by Hotchkiss' residence but did not stop because the house was dark. He telephoned Hotchkiss around 9:30 p.m. and was told by Mrs. Hotchkiss that Hotchkiss was not at home.

6. On October 6, Garcia again directed Caldwell to see Hotchkiss. Caldwell stopped by Hotchkiss' residence around 9:00 a.m. on the 6th and was told by Mrs. Hotchkiss that Hotchkiss was asleep.

7. On October 7, Hotchkiss saw a Dr. Bettertan, who prescribed medication for the patient. In the afternoon of October 7, Hotchkiss telephoned Caldwell to say that he was clear to come back to work.

8. The day of October 8 was previously approved by Hotchkiss' supervisor as an annual leave day. Hotchkiss was scheduled to report to work on the 9th at either 3:30 or 4:00 a.m.

9. On October 9, Hotchkiss left a telephone message with the security guard to tell Caldwell that he would not be in and that Caldwell would know why.

10. On October 10, Hotchkiss had an appointment with Dr. Olson, his regular physician, regarding the back injury. Dr. Olson prescribed a different medication. Hotchkiss was under the impression that he would remain on IOD leave, although the doctor did not specifically say so. Another appointment was set for November 10, 1994.

11. Following his October 10 doctor's appointment, Hotchkiss telephoned Caldwell to advise Caldwell that he would not be back at work until after his appointment with Dr. Olson on November 10. Caldwell so informed Garcia. On October 11, Garcia telephoned the medical center and talked to a nurse, who then faxed him paperwork regarding Hotchkiss' work restrictions. After

receiving the fax, Garcia again called the nurse, who then pulled the patient's records and advised Garcia that Hotchkiss had been instructed by the doctor to return to modified duty on October 10. Garcia noted that this information conflicted with the information Hotchkiss had given to Caldwell.

12. On October 13, Garcia spoke to Dr. Olson, who advised him that Hotchkiss had been released to modified duty and could return to work under certain restrictions. Dr. Olson faxed Garcia a memo to that effect on October 14. In that memo, the doctor admitted that, although he had intended for Hotchkiss to return to work after the October 10 appointment, he "neglected to check the return to work box." (Respondent's Exhibit 3.) (See also Respondent's Exhibit 2, "Physician's Supplemental Report", listing work restrictions but not specifically delineating the patient's work status.)

13. All previous medical report forms that contained work restrictions also indicated that Hotchkiss could return to work. If there were no restrictions listed, the form indicated that Hotchkiss was to be on leave. (Complainant's Exhibit B.)

14. Hotchkiss's absence from work continued through October 19, at which time Garcia directed Caldwell to return to Hotchkiss' residence. Upon doing so on October 19 around 11:00 a.m., Caldwell was told by Mrs. Hotchkiss that Hotchkiss was not at home.

15. On October 19 or 20, Garcia telephoned Hotchkiss' residence and left a message on the recorder that it was urgent for Hotchkiss to contact him.

16. On October 21, Garcia again contacted the nurse at the medical center. She advised him that Hotchkiss had not had any contact with the medical center since October 10.

17. Garcia placed two more telephone calls to Hotchkiss' residence, but no one answered the phone either time. The message recorder was not in use.

18. Hotchkiss telephoned Caldwell around 2:30 or 3:00 p.m. on October 21, saying that he needed to see a specialist and did not know when he would be back at work.

19. Hotchkiss' work restrictions were maximum lifting of ten pounds, maximum pushing of fifteen pounds, and limited bending and stooping.

20. William Price is the Superintendent and appointing authority for AVCF. He was told by Robert Garcia that Hotchkiss was not reporting to work even though he had been released for duty by the doctor.

21. Price was also told by Garcia that Hotchkiss had had problems in the past communicating with his supervisor regarding his injuries and when he would be able to work. At Price's request, by memorandum dated October 19, 1994, Garcia provided Price with a chronological history of Hotchkiss's back problems stemming from "his alleged accident on August 30, 1993 (no witnesses)." (Respondent's Exhibit 4.)

22. On February 14, 1994, Garcia had contacted the medical center to make an appointment for Hotchkiss but was told that the medical center would not set an appointment because Hotchkiss had missed too many appointments in the past. Hotchkiss contacted Garcia on February 28 to say that he was still on injury leave. Garcia did not hear from Hotchkiss again until approximately April 11, 1994.

23. Hotchkiss' June 30, 1994 Performance Planning and Appraisal Form (PACE), prepared by Garcia, reflects as an "area for development" the following: "Needs to communicate with his immediate supervisor in a more efficient manner when it comes to personal needs - sick, family sick or extended periods of injury." (Respondent's Exhibit 6.)

24. Because of tardiness in turning in leave slips, Hotchkiss was told by

Garcia in September 1994 that he needed to turn in the paperwork as soon as possible so Garcia could submit it to the payroll office in timely fashion.

25. Based upon information received from Garcia, Price concluded that Hotchkiss had not been reporting to work and was not on authorized medical or other leave.

26. Price deemed Hotchkiss to be on unauthorized leave for the period October 15-21, inclusive of five consecutive working days. To his knowledge, there had been no contact with Hotchkiss since October 2, the last day Hotchkiss had worked, and that Hotchkiss had not attempted to contact the facility. He was under the impression that Hotchkiss had exhausted all of his sick and annual leave.

27. Exhibit 1 shows that Hotchkiss may not have exhausted his sick leave, but the pertinent numbers are illegible. The parties dispute whether there was any remaining sick leave. There is no dispute that all annual leave was exhausted.

28. Price deemed Hotchkiss to have resigned his position and, on October 21, 1994, without other notice, sent a letter to Hotchkiss terminating his employment under R9-1-4. (Respondent's Exhibit 5.)

29. Upon receipt of the termination letter on October 22, Hotchkiss telephoned Caldwell to confirm that he had contacted Caldwell on October 10. Hotchkiss recorded this brief conversation. (Complainant's Exhibit A.)

30. Hotchkiss testified that his answering machine had run out of tape and that the alleged October 19 or 20 message from Garcia would not have been recorded. He testified that on October 6 and 7 he was heavily sedated and asked his wife to see that he was not disturbed.

31. A timely appeal of the administrative termination was received in the office of the State Personnel Board on October 31, 1994.

DISCUSSION

This case involves an administrative termination of employment, as opposed to a disciplinary action. Therefore, the burden of proof rests with Complainant to show by preponderant evidence that the action of Respondent was arbitrary, capricious or contrary to rule or law. Renteria v. Department of Personnel, 811 P. 2d 797 (Colo. 1991); Kinchen v. Department of Institutions, ___ P.2d ___, Supreme Court No. 93SC414 (Dec. 19, 1994).

Complainant Daniel R. Hotchkiss was deemed by the appointing authority to have resigned his position pursuant to Rule R9-1-4, 4 Code Colo. Reg. 801-1, which provides in full:

> Absence Without Approved Leave. A full-time employee who is absent without approved leave for a period of 5 or more consecutive working days may, at the discretion of the appointing authority, be deemed to have resigned with prejudice.

Complainant contends that Respondent's action was arbitrary, capricious or contrary to rule or law because, believing that he was on approved "injury on duty" leave, he did not abandon his position and had no intent to resign. Complainant submits that, had he been notified of his impending administrative termination, he would have reported to work immediately, and that the termination of his employment under R9-1-4 was therefore improper.

Respondent asserts that Hotchkiss should have been reporting to work as of October 7, 1994, that there is no evidence that he was unable to work, and that the Department of Corrections does not have an affirmative duty to inform its employees that they have to be at work.

The administrative law judge adopts the following analysis with respect to the

proper use of R9-1-4:

> Rule 9-1-5 [now R9-1-4] was intended to be available to appointing authorities when all the facts and circumstances of a case indicate an abandonment of the job by the employee. This rule does not apply to those cases where the appointing authority has actual or constructive knowledge of the whereabouts of an absent employee, and the predisposing valid reason, medical or otherwise, that the employee has not appeared for duty. The cited rule is not a substitute for disciplinary action for abuse of leave, in appropriate cases.

Drury v. Colorado Division of Employment, Case No. 75-308 (Molnar, Initial Decision, Sept. 1975).

The Colorado Court of Appeals approved this construction of R9-1-4 in Ornelas v. Department of Institutions, 804 P.2d 235 (Colo. App. 1990), finding that the rule is applicable "only to situations involving the abandonment of a job by an employee in which the appointing authority is aware of no apparent reason for the employee's absence."

In view of the evidence as a whole, it is found that the termination of Complainant's employment under R9-1-4 was improper.
The appointing authority at all times possessed actual or constructive knowledge of Complainant's whereabouts together with the purported reason for his absence. There is no evidence that Complainant at any time intended to abandon his position. To the contrary, he contacted his immediate supervisor on the very day that the termination letter was mailed to him.

Complainant proved by preponderant evidence that he did not abandon his position and did not evince an intent to resign. Administrative action was taken instead of disciplinary action. That the appointing authority considered Complainant's history of evasiveness regarding his work status is confirmation that disciplinary reasons were taken into account in administering the administrative termination.

This case is distinguishable from Zagar v. Colorado Department of Revenue, 718 P.2d 546 (Colo. App. 1986), where the court ruled that the appointing authority did not abuse the exercise of discretion by construing written notice of the employee's refusal to accept a geographical transfer with an unapproved absence of five consecutive days as a resignation under R9-1-4. In Zagar, the record contained substantial evidence to find that the employee had intentionally abandoned his position. See also, Costa v. Department of Regulatory Agencies, Case No. 94B036 (Thompson, Initial Decision, Nov. 1993). Here, the administrative action was taken because of information indicating that Complainant was medically able to return to work but did not do so. Abuse of leave should give rise to disciplinary, not administrative, action.

It is thus found that the administrative action was implemented as a substitute for disciplinary action. Especially in view of Complainant's past communication deficiencies, Respondent knew or should have known that Complainant did not intend to resign. Complainant's contacts with the employer were sufficient to indicate that he was not abandoning his position. It appears, moreover, that the appointing authority did not have all of the available information before him when he made his decision.

When disciplinary action is taken against a certified state employee, certain due process rights become effective. Due process entails notice and opportunity to be heard. In the present matter, the appointing authority should have conducted a more thorough investigation and assured himself of the completeness of his information. A predisciplinary meeting should have been held. Complainant should have received written notice of specific charges. The final decision of the appointing authority should have been governed by the factors set forth in Rule R8-3-1, 4 Code Colo. Reg. 801-1.

Nevertheless, the evidence presented at hearing established that disciplinary action was warranted. The administrative law judge is persuaded that Complainant was intentionally avoiding his employer in an effort to not return to work for as long as possible without sacrificing his job. He did not

communicate openly. He had reason to know that his evasiveness was a concern to his supervisor, and not a new concern. Yet he made no attempt at an honest discussion which would have resolved any misunderstandings. He unilaterally decided that his leave was approved. While it is true that Dr. Olson did not specifically state on October 10 that Complainant should report for work, the fact that the doctor endorsed specific work restrictions was a reasonable indicator that Complainant could return to modified duty and should have done so. By alleging that he would have returned to work immediately had he known of his administrative termination in advance, Complainant acknowledges that he was physically able to work.

In a similar case in which the action of the appointing authority was reversed as an improper implementation of R9-1-4, where disciplinary action should have been taken instead, another administrative law judge ruled:

> Complainant is not, however, blameless in this situation. She assumed that her absence would be charged to annual leave. The mere fact that an employee unilaterally announces that she will not appear for work at a certain time does not create an authorized absence. [Citation omitted.] And an employee is at risk in such circumstances that the leave will not be approved and that the employee will be subject to disciplinary action for taking unauthorized leave. [Citations omitted.]
>
> This hearing officer is cognizant that complainant was not terminated under the disciplinary provisions of the Board rules. However, the facts established at hearing that complainant did not have permission, either express or implied, to be absent beyond July 21, 1989 would support such an action and the hearing officer deems a second evidentiary hearing on this point to be unnecessary and an inefficient use of resources. What would remain at issue is the propriety of the discipline, if any, imposed. Complainant must bear responsibility for the situation in which the parties find themselves. Accordingly, the hearing officer is ordering a suspension....

Allen v. University of Colorado Health Sciences Center, Case No. 890-B-029 (Manzanares, Initial Decision, Jan. 1990).

This judge concludes that the above analysis is appropriate for use in the

present circumstance. Respondent was not justified in deeming Complainant to have resigned. Yet the established facts support disciplinary action. Accordingly, a disciplinary suspension will be ordered pursuant to Rule R8-3-4(A)(1), 4 Code Colo. Reg. 801-1. This order presumes that Complainant is a non-exempt employee as defined by the Fair Labor Standards Act and that, therefore, the order is in compliance with Rule R8-3-3(A)(1), 4 Code Colo. Reg. 801-1. No evidence on this issue was presented at hearing.

CONCLUSIONS OF LAW

1. Respondent's action in terminating Complainant's employment under R9-1-4 was arbitrary, capricious or contrary to rule or law.
2. A disciplinary suspension is warranted.

ORDER

Complainant's termination pursuant to R9-1-4 is rescinded. A disciplinary suspension is substituted for the period October 22, 1994 through the date that this decision becomes final, not to exceed 135 days. Complainant is reinstated to his former position with full back pay and benefits with an offset for any substitute income and except for the period of suspension. Complainant is deemed to have been on leave without pay for days when his sick and annual leave were exhausted from October 7 through October 21, 1994.

DATED this _____ day of January, 1995, at Denver, Colorado.

_____
Robert W. Thompson, Jr.
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the _____ day of January, 1995, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Daniel R. Hotchkiss
4910 Marabou Way
Security, CO 80911

and in the interagency mail, addressed as follows:

Joseph Haughain
First Assistant Attorney General
Department of Law
Human Resources Section
1525 Sherman Street, 5th Floor
Denver, CO 80203

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